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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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The Federal Power Commission petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-23a) is reported at 510 F.2d 1264. The initial order of the Federal Power Commission (App. C, *infra*, pp. 26a-35a), its order clarifying the prior order (App. D, *infra*, pp. 36a-40a), and its order denying rehearing (App. E, *infra*, pp. 41a-45a), are

reported at 50 FPC 289, 50 FPC 1293, and 50 FPC 1780, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1975 (App. B, *infra*, pp. 24a-25a). On June 27, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 2, 1975. On August 1, the Chief Justice further extended the time for filing a petition for a writ of certiorari to September 1, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the Federal Power Commission properly determined that it lacked the power, in ruling on a proposed wholesale rate increase, to remedy the alleged anticompetitive impact of the utility's charging a higher rate on its jurisdictional wholesale sales than it charged on direct retail industrial sales, which are not subject to the Commission's jurisdiction.

STATUTES INVOLVED

Sections 201, 205, and 206 of the Federal Power Act, 16 U.S.C. 824, 824d, and 824e, are set forth in Appendix F. *infra*, pp. 46a-51a.

STATEMENT

1. On May 31, 1973, Arkansas Power & Light Company (APLC) filed a wholesale rate increase pursuant to Section 205(d) of the Federal Power Act, 16 U.S.C. 824d(d). Thereafter, certain of APLC's wholesale customers, including respondents Conway Corporation, *et al.* (Conway), sought intervention and moved to reject the rate increase on the ground that APLC "participates in anticompetitive activity and that the proposed rate increase would 'squeeze' [them] out of competition with respect to [retail] sales to industrial customers" (App. C, *infra*, p. 28a).[1]

On July 31, 1973, the Commission issued an order which accepted the tariff sheets for filing, suspended their effectiveness for five months and set the matter for hearing to determine the justness and reasonableness of the proposed rate. The Commission, however, refused to allow Conway to introduce evidence of alleged anticompetitive activities, since Conway had not demonstrated any relief "which is within this Commission's authority to direct" even if the allegations were true (App. C, *infra*, p. 28a). However, the Commission invited the respondents to file an amended petition setting forth requested relief which

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[1] Like many large utilities, APLC makes sales of electricity both at wholesale for resale (subject to the Commission's jurisdiction) and at retail, directly to industrial customers (not subject to the Commission's jurisdiction). APLC competes with some of its wholesale customers for retail business.

they believed to be within the Commission's authority to direct (*ibid.*).

In their amended petition respondents urged "that the Commission reduce the [wholesale] rate sought by APLC to eliminate the price squeeze" (App. D, *infra*, p. 37a). The Commission again concluded that the relief sought was beyond its power to grant (*ibid.*). The Commission reasoned that in setting the just and reasonable rate, it is required to allow—and only to allow—recovery of properly allocated costs—"[w]holesale rates must recover allocated wholesale costs" (App. A, *infra*, p. 38a). The difficulty with the relief proposed by respondents was that the "suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates," which rates are "under the sole jurisdiction of the state commission and not the Federal Power Commission" (*ibid.*). Thus a " 'price squeeze,' in and of itself, does not constitute anticompetitive behavior by APLC given the fact that any wholesale rates we approve must be based on allocated wholesale costs," regardless of the basis used by the state commission to set direct industrial rates (*ibid.*).

Since it could provide no remedy under the Federal Power Act, the Commission determined that it could properly dispose of Conway's objections "without a hearing and extended investigation." *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747, 762 (App. D, *infra*, p. 39a).

2. Upon review, the court of appeals rejected the Commission's analysis and remanded the orders. The court acknowledged that Sections 205 and 206 of the Federal Power Act, 15 U.S.C. 824(d) and 824e, apply only to "transmission[s] or sale[s] subject to the jurisdiction of the Commission," but held that the Commission had the authority under those sections to remedy "claims of discrimination between rates for two classes of service, only one of which is 'subject to the jurisdiction of the Commission' " (App. A, *infra*, pp. 12a-13a).

Accepting the assertion of Conway that the price differential between APLC's proposed wholesale rate and its nonjurisdictional retail industrial rate would make "it impossible for [Conway] to maintain parity with APLC in competing for retail customers" (*Id.* at p. 3a), the court found that the Commission had the authority to modify the proposed wholesale rate, if necessary, to relieve the "price squeeze" (*Id.* at pp. 20a-23a). The court recognized that the Commission could not approve a wholesale rate which failed to recover properly allocated wholesale costs (*Id.* at p. 22a); however, the court reasoned that after ensuring that "both the retail rate and the proposed wholesale rate" are "within a zone of reasonableness," the Commission could select a wholesale rate "in the lower range of the zone of reasonableness" and provide relief (*ibid.*).

REASONS FOR GRANTING THE WRIT

1. Under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, the Commis-

sion has authority to eliminate discrimination between sales which are subject to its jurisdiction. However, the Commission has no authority under the Act to remedy a claim of discrimination between a jurisdictional wholesale rate and a nonjurisdictional direct industrial rate.

The Federal Power Act limits the jurisdiction of the Commission to "the sale of electric energy at wholesale in interstate commerce," 16 U.S.C. 824a(b). Accordingly, Section 205(b), 16 U.S.C. 824d(b), prohibits discrimination between "sales subject to the jurisdiction of the Commission." That section provides, in part:

> No public utility shall, *with respect to any transmission or sale subject to the jurisdiction of the Commission* * * * maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or classes of service. [Emphasis supplied.]

Similarly, Section 206(a) of the Federal Power Act, 16 U.S.C. 824e(a), limits the Commission's power to the remedy of a discrimination in a "sale subject to the jurisdiction of the Commission." [2]

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[2] The Commission has always viewed its authority as limited to the prevention of undue discrimination "among wholesale customers." *Alabama Electric Cooperative, Inc.* v. *Alabama Power Company*, 38 FPC 962, 974-975 (1967). See also, *St. Michaels Utilities Commission* v. *Eastern Shore Public Service Co.*, 35 FPC 591, 595 (1966); *Southwestern Public Service Company*, 33 FPC 343, 346 (1965); *Jaspan* v. *Philadelphia Electric Co.*, 1 FPC 561, 565 (1938).

The court of appeals declined to give the words of the statute their plain meaning, arguing instead that if Congress had wanted to limit the Commission's authority to the consideration of discrimination among rates which are the subject of the Commission's jurisdiction, it would have prohibited the maintenance of unreasonable differences in rates "between classes of service subject to the jurisdiction of the Commission" (App. A. *infra*, p. 15a) However, Section 205 (b) already limits the Commission's jurisdiction "to any transmission or sale subject to the jurisdiction of the Commission." Under the reasoning of the court of appeals, this language would be mere surplusage.[3]

Our ~~hearing~~ reading of the plain language of Sections 205 (b) and 206(a) is supported by the legislative history of the Federal Power Act, which discloses that the drafters assiduously strove to limit the jurisdiction of the Federal Power Commission to the regulation of *inter*state rates and to assure that *intra*state rates be kept within the separate jurisdiction of the state utility commissions. This intent is evidenced by the following colloquy between Representative Petengill

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[3] Equally unpersuasive is the court's interpretation of the phrase "subject to the jurisdiction of the Commission" in Section 206(a) as limited to assuring that any sanction imposed by the Commission to remedy anticompetitive conduct be directed to the jurisdictional rate (App. A, *infra*, p. 16a). Such an interpretation would also render the phrase surplusage since Section 201 of the Act limits the jurisdiction of the Commission to "the sale of electric energy at wholesale in interstate commerce."

of the House Committee on Interstate and Foreign Commerce and Mr. Dozier Devane, one of the principal drafters of Title II of the Federal Power Act, when the Wheeler-Rayburn Bill was before the Committee: [4]

> Mr. Petengill: You say this bill gives the Power Commission jurisdiction over wholesale energy in interstate transmission.
>
> Mr. Devane: Yes.
>
> Mr. Petengill: Suppose the retail rate or wholesale rates in intrastate are fixed by the State Commission, and were so low that for the company to exist it had to charge exhorbitant rates for its wholesale interstate business. Then would not the doctrine of the Shreveport case apply?
>
> Mr. Devane: No sir.
>
> * * * *
>
> Mr. Devane: The interstate rate should be determined upon its reasonableness, its reasonableness without regard to what the intrastate rate is.
>
> Mr. Petengill: That is what it should be.
>
> Mr. Devane: And the intrastate rate should be determined upon its reasonableness.

This colloquy evidences a clear intent to limit the Commission's authority to a consideration of the wholesale rate level, and to preclude regulation of non-

[4] Hearings before the House Interstate and Foreign Commerce Committee on H.R. 5423, 74th Cong., 1st Sess., March 8, 1935, p. 503.

jurisdictional retail rate level. Thus the Federal Power Act envisions that the determination of the justness and reasonableness of wholesale rates be made independent of, and without reference to, the retail rate. Yet, under the decision of the court of appeals, the Commission's determination of the justness and reasonableness of the jurisdictional wholesale rate must be made on the basis of a retail level which is subject to the sole jurisdiction of the state commission.

2. *a.* The court of appeals further erred in supposing that the Commission could remedy an alleged discrimination between jurisdictional wholesale rates and nonjurisdictional direct industrial rates by adjustment of the wholesale rate. In setting "just and reasonable" rates the Commission must allow a utility to recover properly allocated costs. As the Commission said (App. D, *infra*, p. 38a): "Wholesale rates must recover allocated wholesale costs." Thus the rate set by the Commission is wholly a function of costs: it must do no more—and no less—than allow recovery of costs plus reasonable return.

The wholesale electric utility rate is, therefore, an improper vehicle for consideration of non-cost factors. This court recently recognized the inability of a regulatory agency to give adequate measure to such factors in ratemaking proceedings in *Aberdeen and Rockfish Railroad Company* v. *S.C.R.A.P.*, Nos. 73-1966 and 73-1971, decided June 24, 1975. In that case the Court concluded that "the standards of the Act are broad enough to permit consideration of en-

vironmental factors, even at general revenue proceedings," but added (slip op. p. 29, n. 21):

> At the same time, standard ratemaking criteria limit the power of the ICC to force railroads to transport recyclable materials at deficit rates no matter how much the environment would be benefited thereby and no matter how much environmental injury would be caused by not doing so. Under present statutes, for example, the railroads could not be required to reduce rates on recyclables to zero.

While purporting to recognize the statutory factors which define and limit the Commission's ratemaking authority, the court of appeals found sufficient "latitude" in wholesale ratemaking to permit the Commission to remedy a price squeeze by lowering that rate (App. A, *infra*, p. 22a). The court argued that there is a "zone of reasonableness" for such rates and that the Commission can "at the very least * * * put wholesale rates at the lower range of the zone of reasonableness, when it finds anticompetitive conduct" (*ibid.*).

However, the "zone of reasonableness" is both an inadequate and inappropriate weapon with which to attack a "price squeeze." The Commission's aim in setting wholesale rates for electric utilities is always to set them at the lowest rate consistent with the public interest. The Commission does not locate a "zone of reasonableness" and then select a rate within the zone.[5] Rather, the Commission selects the single proper rate on the basis of its assessment of the cost evidence.

The typical controversy in a utility rate is not over the *valuation* of specific cost items, but concerns whether specific items of known value, such as advertising costs, may properly be recovered. While the Commission must necessarily make judgments with respect to these disputes, these judgments do not create a "zone of reasonableness." The standards for the resolution of such disputes have no relation at all to allegations of anticompetitive conduct.[6] It would be simply irrational to disallow an item of cost, such as advertising costs, upon an allegation that the retail industrial rate is set too low.

The only "zone of reasonableness" which might be found in utility ratemaking is the range of poten-

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[5] In setting area rates for natural gas producers, the Commission customarily finds a range of reasonable rates and selects a rate within the range. See, *e.g.*, *Placid Oil Co., et al.* v. *FPC*, 483 F.2d 880 (C.A. 5), affirmed *sub nom. Mobil Oil Corp.* v. *FPC*, 417 U.S. 283. The "zone of reasonableness" in producer ratemaking exist because, given the lists of available data and methodology, the costing of natural gas production is necessarily somewhat imprecise, and because average, rather than individual company-by-company costs are investigated. There is, for all practical purposes no "zone of reasonableness" in electric utility ratemaking because precise data is available and rates are reviewed on a company-by-company basis.

[6] *Mississippi River Fuel Corp.* v. *F.P.C.*, 163 F.2d 433, at 437 (D.C. Cir. 1947); See also, *West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio*, 292 U.S. 63 (1935); A.J.G. Priest "Utility Advertising and Other Operating Expenses" 75 Public Utilities Fortnightly 23, 27 (April 29, 1965).

tially appropriate rates of return on net investment rate base, specifically the rate of return on common equity. But even here there is no room to consider allegations of anticompetitive conduct. The Commission must select a rate of return on common equity which is commensurate with the risks associated with the investment, and which will be sufficient to maintain existing equity investment as well as attract new investment at reasonable costs.[7] Only in this manner may this Commission assure the financial integrity of the utility at the lowest reasonable costs. It makes no sense, and would indeed be impermissible, to select a rate on equity which did anything other than fulfill these criteria, because of allegations of price squeeze.

There is, in consequence, no "reasonable nexus between the matters subject to [the Commission's] surveillance and those under attack on anticompetitive grounds." *City of Lafayette, Louisiana* v. *S.E.C.*, 454 F.2d 941, 955 (C.A.D.C.) aff'd, *sub nom. Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747.

b. The Court's holding that the Commission should provide the remedy for "price squeeze" is due

[7] See, *e.g.*, *Bluefield Waterworks & Improvements Co.* v. *P.S.C.*, 262 U.S. 679; *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591. The Commission does permit any interested party to submit relevant evidence, including evidence of monopolization, which bears upon the risk associated with investment. *Pacific Gas & Electric Co.*, Docket No. E-8929 and E-7777, August 22, 1974, pending on petition for review, No. 74-3430 (C.A. 9). Conway's allegations, however, were not of this kind; rather, it asked the Commission to determine the wholesale rate by reference to nonjurisdictional retail rates.

to its conclusion that it was the wholesale rate which would make "it impossible for petitioners to maintain parity with APLC in competing for retail customers" (App. A, *infra*, p. 3a). However, the operative factor may not be the wholesale rate level at all but the retail industrial rate as prescribed by the State commission. Furthermore, Conway's alleged inability to compete with APLC for the retail industrial market may be attributable to its own retail rate design, which may require its industrial rates to bear a disproportionate share of the retail costs. By concluding that the wholesale rate level is responsible for the "price squeeze," however, the court oversimplified the problem and vastly underestimated the burden which it imposed upon the Commission.

To adequately investigate a "price squeeze" allegation, it may be necessary for the Commission to investigate not only the propriety of the retail rate level of the filing utility but also the retail rates of the complaining resale customer to ensure that these latter rates are, themselves, not improperly high. The administrative burden associated with this task is enormous.[8] In view of the very limited and inef-

[8] The threshold problem would be whether federal or state standards should be applied in reviewing the propriety of these non-jurisdictional rates. Moreover, the Commission would be confronted with the evidentiary problem of obtaining all of the necessary data from complaining customers, many of whom are unregulated municipal electric systems which do not maintain the type of records and accounts necessary for an adequate cost review by the Commission. Even assuming

fectual relief which the Commission might provide, the imposition of this burden is unwarranted.

3. The Commission has not been granted the power to adjudicate antitrust issues as such, outside the regulatory powers it possesses. *California* v. *F.P.C.*, 369 U.S. 482, 486. Accordingly, the authority of the Commission to consider the anticompetitive implications of its regulatory decisions is not without limitation and, in appropriate circumstances, the Commission can summarily dispose of allegations of anticompetitive conduct without hearing and investigation. *Gulf States Utilities Co.* v. *F.P.C.*, *supra* at 762-763.* The decision of the court below that the Commission must consider antitrust allegations for which it can provide no meaningful relief, conflicts with these decisions and will severely impair the Commission's rate review functions under the Federal Power Act.

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that all of the necessary data could be obtained, its assessment would greatly increase the length and complexity of rate proceedings.

* This is not to say that this Commission will not consider antitrust allegations in rate proceedings where the issue is properly raised and where relief within this Commission's authority is available to grant. Cf. *Pacific Gas and Electric Company*, Docket No. E-7777, order issued March 14, 1974; *Wisconsin Public Service Corporation*, Docket No. E-8867, order issued August 23, 1974; and *Carolina Power and Light Company*, Docket No. E-8887, order issued August 26, 1974.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor.

JOHN H. BURNES, JR.,
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SEPTEMBER 1975.

I authorize the filing of this petition.

ROBERT H. BORK
Solicitor General

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2207

CONWAY CORPORATION ET AL., PETITIONERS,

v.

FEDERAL POWER COMMISSION, RESPONDENT,

ARKANSAS POWER & LIGHT COMPANY, INTERVENOR.

United States Court of Appeals
District of Columbia Circuit

Argued Oct. 23, 1974
Decided April 4, 1975

Municipally owned and cooperative electrical systems petitioned for review of order of Federal Power Commission denying their petition to intervene in proceeding on proposal for wholesale electric rate increase by utility from which these systems purchased power and with which they competed at retail level. The Court of Appeals, Leventhal, Circuit Judge, held that such order was so definitive in character and of such a significant and immediate impact on petitioners as to meet criterion for reviewability, that the Commission's authority and responsibility to weigh discriminatory effects in rate proceedings extends to claims of discrimination between rates for two classes

of services, only one of which is subject to the jurisdiction of the Commission, and that the Commission's jurisdiction to review a petition to set aside or reduce a utility's wholesale electric rate increase permits consideration of the utility's alleged purpose, and effect, to forestall its customers from competing with it at retail.

Case remanded with directions.

Before TAMM, LEVENTHAL and MacKINNON, Circuit Judges.

Opinion for the Court filed by Circuit Judge LEVENTHAL.

LEVENTHAL, Circuit Judge:

In this case, we hold that the Federal Power Commission's jurisdiction to review a petition to set aside or reduce a utility's wholesale electric rate increase permits consideration of the utility's alleged purpose, and effect, to forestall its customers from competing with it at retail.

On May 31, 1973, Arkansas Power & Light (AP&L) filed with the FPC a wholesale rate proposal that would increase electricity rates to municipally owned systems by 22.6 percent, and to cooperatives by 34.9 percent. Petitioners are municipally owned and cooperative electrical systems that (a) purchase from AP&L all or a major portion of the electricity they resell to retail customers; and (b) compete with AP&L at retail for large industrial customers, and have historically been able to match

AP&L tariffs for such loads. AP&L's filing would, in some cases, elevate its wholsale rates to petitioners above its retail rates, thus making it impossible for petitioners to maintain parity with AP&L in competing for retail customers.

Petitioners filed a timely Protest, Motion to Reject, and Petition to Intervene with the Commission. They alleged, *inter alia*, that AP&L's increase in wholesale prices represented "an attempt to squeeze petitioners or some of them out of competition, and to make them more susceptible to the persistent attempts of the company to take over the publicly owned systems in the State," [1] and asked that the proposed rate increase be rejected.

The FPC, by Order of July 31, 1973, accepted, and suspended until January 1, 1974, the proposed rate schedule. Intervention by Petitioners was limited to matters other than the alleged driscrimination. In its Order denying intervention on this question the Commission referred to its earlier order in Indiana & Michigan Electric Co., 49 FPC 1232 (1973), which set minimum standards that must be met before protestants can obtain intervention and hearing on anti-competitive issues and avoid disposition made summarily: The petition must clearly specify "1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct." Petitioners, the FPC held, had failed to meet the third criterion.

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[1] Petitioners' Protest, Motion to Reject, and Petition to Intervene, June 28, 1973, J.A. 8.

Petitioners' Amended Petition to Intervene asked that the proposed wholesale rates be reduced to eliminate the price squeeze. It was denied by a Commission order of October 29, 1973, on the same ground. The FPC clarified its former order by characterizing petitioners' suggested relief as "a rate related not to wholesale costs but rather related to [AP&L's] industrial rates," which are not within the Commission's jurisdiction.[2] A subsequent petition for rehearing was denied, and a petition for review was filed in this court.

We hold that the FPC has jurisdiction to consider anti-competitive allegations of the sort raised by petitioners and indeed must consider them in determining whether the rate proposed by AP&L is a "just and reasonable" rate.

I. FINALITY OF ORDER BELOW

The Commission contends that the order denying intervention on this issue was not of the "definitive character" required by section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b) (1970), as construed in FPC v. Metropolitan Edison Co., 304 U.S. 375, 384, 58 S.Ct. 963, 82 L.Ed. 1408 (1938). Although petitioners have been allowed to intervene in the Commission hearing to raise other, unrelated challenges to the proposed schedules, we find this an appropriate order for review at this time.

[2] Order of October 29, 1973, Denying Amended Petition to Intervene and Clarifying Prior Order, J.A. 102.

We may profitably follow the lead of the Supreme Court in defining finality in "pragmatic terms. *See* Cox Broadcasting Corp. v. Cohn, —— U.S.. ——, 95 S.Ct. ——, 42 L.Ed.2d ——, 43 U.S.L.W. 4343 (U.S., March 3, 1975). We are to make "a realistic appraisal of the consequences" of the challenged action.[3] An order is reviewable when it "imposes[s] an obligation, den[ies] a right or fix[es] some legal relationship."[4] We look to whether there has been "an effective deprivation of [petitioners'] rights."[5] We find the order denying intervention here so definitive in character and of such a significant and immediate impact on petitioners as to meet this criterion.

Petitioners raise a question of law, which will not be better defined by further development of the record. The FPC has taken a firm position that petitioners have no legal right to FPC consideration of their antitrust allegations. Because it sees the bar to be jurisdictional, the FPC considers the issue closed. It is not deferring consideration of the ques-

[3] Isbrandtsen Co. v. United States, 93 U.S.App.D.C. 293, 297, 211 F.2d 51, 55, cert. denied sub nom. Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990, 74 S.Ct. 852, 98 L.Ed. 1124 (1954).

[4] Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948).

[5] National Airlines, Inc. v. CAB, 129 U.S.App.D.C. 180, 187, 392 F.2d 504, 511 (1968), cited in Thermal Ecology Must Be Preserved v. AEC, 139 U.S.App.D.C. 366, 368, 433 F.2d 524, 526 (1970).

tion [6] or considering the matter in other proceedings.[7] On the contrary, the Commission has repeatedly refused in other proceedings [8] to consider similar allegations. Thus, we are presented with a definitive administrative conclusion on a recurring question of law that will shape numerous unrelated proceedings if judicial review is deferred. Disruption of the orderly process of adjudication is a factor to be considered.[9] But our review now on this point does not interfere with the FPC's conduct of the proceeding it has already put under way.

There is a need here for swift resolution of the anti-competitive jurisdictional issue, not only be-

[6] *Compare* Overseas National Airways, Inc. v. CAB, 426 F.2d 725 (2d Cir. 1970), where the coutr refused to review a refusal by the CAB to expand the scope of a proceeding concerning transatlantic passenger charter authority to include the issue of transatlantic cargo charter authority. The court stressed that the CAB had not suggested that the excluded issue would remain closed indefinitely, but had merely deferred consideration. 426 F.2d at 727-28.

[7] *Compare* Ecology Action v. AEC, 492 F.2d 998, 1001 (2d Cir. 1974).

[8] *E.g.*, Southern California Edison Co., 50 F.P.C. 836 (1973); Florida Power & Light Co., 50 F.P.C. 1626 (1973); Order of January 3, 1974, in Union Electric Co., Docket No. E-8215; Opinion No. 681 of January 7, 1974, in Commonwealth Edison Co., Docket No. E-7578; Order of February 28, 1974, in Public Service Co. of Oklahoma, Docket No. E-8242; Order of March 14, 1974, in Pacific Gas & Electric Co., Docket No. E-777; Order of April 19, 1974, in Wisconsin Electric Co., Docket No. E-8619.

[9] Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71, 91 S.Ct. 203, 27 L.Ed. 2d 203 (1970).

cause it is recurring, but because the FPC's determination has a substantial and immediate impact on the parties that cannot be remedied by subsequent agency action.[10] The competitive context in which petitioners operate sets the stage for our analysis. In competing with supplying companies, municipal and cooperative systems seek to maintain customer satisfaction with the quality and price of their service in order to attract new industries and to retain existing customers; continued satisfaction is also necessary to ensure voter support for the municipal systems. At its most basic level, this competition represents a struggle on the part of the municipal and cooperative systems to preserve their independence from their supplier insofar as they compete at retail. The context has been described by Professor Meeks in Concentration in the Electric Power Industry: The Implant of Antitrust Policy, 72 Colum.L.Rev. 64, 78 (1972):

> To illustrate, assume that a municipal system is buying all or most of its power from a neighboring private system. There exists between the two an indirect, but very real competition to serve their respective areas since the state commission or the voting public might well decide to allow the system that furnished the cheapest power to serve both areas. Unless the municipality has access to alternative sources of economical power . . . the neighboring system can virtually control the performance of the

[10] *Cf.* Atlanta Gas Light Co. v. FPC, 476 F.2d 142, 147 (5th Cir. 1973).

> municipal system through its control over the wholesale price of power. . . . Such control by selling systems is probably very common and very effective, primarily because of the almost universal control over transmission by the dominant selling system in an area. This kind of "unfair" competition is usually directed at municipals and cooperatives but also occasionally at small private systems, particularly when the seller is seeking to absorb the smaller system by merger.[11]

Through its position as supplier, AP&L will be able, if there is no FPC jurisdiction to consider the public interest in AP&L's discriminatory levels, to affect the quality and price of petitioners' retail service in such a way as to tilt the scales of competition in its favor.

The refusal of the FPC to consider discriminatory treatment between jurisdictional and nonjurisdictional rates will inevitably and immediately affect the

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[11] *See also* Hearings on S. 218 Before the Senate Comm. on Commerce, 89th Cong., 1st Sess., ser. 89-38, at 68 (1965):

To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industrial businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.

The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers.

context in which long-term contracts will be bargained for, and relatively irrevocable location decisions will be made by potential industrial customers. Judge Friendly has found—we need not go so far—these considerations determinative of the question of finality even where the agency has held that it has jurisdiction and is continuing to investigate an issue on its merits.[12]

The immediate effect of the FPC's order on the shape of decision-making in the industry is not gainsaid by the possibility that the FPC may set aside the wholesale rate increase in the rate proceeding, and order a refund of over-charges made after the suspension terminated. First, such relief would in a sense be adventitious, and totally divorced from any consideration of the discrimination problem that is claimed to be part of the public interest. Second, the discriminatory charges may last for years before the wholesale rate is reduced, if it is reduced, on other

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[12] [T]he Court held it sufficient that the order, although merely declaratory, "touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done." . . . [T]he consideration that prompts us to hold the order reviewable—is the likelihood that before the Commission's investigation is concluded and judicial review can be had, NYSA and ILA will be bargaining for a new agreement; it is important for them to know whether any assessment formula that may be included therein will be subject to Commission review.

New York Shipping Ass'n v. FMC, 495 F.2d 1215, 1219-20 (2d Cir. 1974), *quoting* Frozen Food Express v. United States, 351 U.S. 40, 44, 76 S.Ct. 569, 100 L.Ed. 910 (1956).

grounds. The initial rate filing in this case, for example, was made on May 31, 1973, and hearings are still being held. Third, the potential discriminatory impact is not limited to the parties in this proceeding, but affects the competitive relationship of suppliers and customer-competitors throughout the country.[13]

The FPC contends that petitioners are not injured because they can still raise "valid" anticompetitive issues—those regarding discriminatory treatment between wholesale customers—in the Commission proceeding. This begs the question: It is clear that the Commission will not consider the claims that are raised by petitioners and will not give them the protection they request and may need. Indeed, if we were to peek ahead into the merits to decide jurisdiction, this case would be more appropriate for sustaining jurisdiction on the ground of the strong likelihood of reversal.[14]

II. MOOTNESS

On March 18, 1974, AP&L filed an application for a 22.6 percent increase in its retail electric rates with

[13] *See, e.g.*, cases cited in note 8 *supra*.

[14] Jurisdiction to review exclusionary rulings may be sustained even absent significant injury where, in the words of Judge Friendly, the agency's ruling is "so flagrantly wrong and demonstrably critical as to make it apparent that the agency is not merely courting the possibility of reversal but is running into the certainty of it if the ultimate decision should be against the proponent of the evidence." Ecology Action v. AEC, *supra*, 492 F.2d at 1001.

the Arkansas Public Service Commission. We cannot remand for consideration of this changed factual situation unless we order a reversal of the FPC, since, unreversed, the FPC will abide by its determination that it lacks jurisdiction to consider such factual allegations. Without further factual consideration by the Commission we are unable to evaluate whether the question has been mooted by AP&L's state application, particularly in light of petitioners' contentions that the proposed retail rate increase is not sufficiently great and that AP&L has indicated that it intends to file a second wholesale increase.

III. THE MERITS

A. *The Statute*

All parties agree that the FPC has the authority to weigh certain allegations of anticompetitive effects, and is indeed required to do so. The "important and broad regulatory power" vested in the Commission by Title II of the Public Utility Act of 1935, 49 Stat. 803, was recently described by the Supreme Court in Gulf States Utilities Co. v. FPC, 411 U.S. 747, 758-59, 93 S.Ct. 1870, 1878, 36 L.Ed.2d 635 (1973), as "clearly carr[ying] with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to . . . directives contained in §§ 205, 206 [16 U.S.C. §§ 824d, 824e (1970)] . . ." *See also* Otter Tail Power Co. v. United States, 410 U.S. 366, 373-74, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); City of Huntingburg v. FPC, 162 U.S.App.

D.C. 236, 241-242, 498 F.2d 778, 783-84 (1974). *Gulf States Utilities* and *Otter Tail*, like the present case, concerned alleged anticompetitive efforts by utilities engaged in wholesale and retail sales to squeeze municipal systems and rural cooperatives that both competed with and purchased power from them. In *Gulf States* certain cities protested, under § 204 of the Federal Power Act, 16 U.S.C. § 824c (1970), a utility's application for authority to issue bonds; the cities alleged that the proceeds from the proposed bonds would be used to finance anticompetitive activities. *Otter Tail* was a civil action under § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2 (1970), based on various alleged anticompetitive activities—such as refusals to sell, refusals to wheel, the institution of litigation, and the denial of access to other suppliers by means of Otter Tail's transmission systems—directed against existing and proposed municipal systems. Neither case raised the issue, now before this court, of discriminatory effects caused by differences between wholesale and retail rates.

Sections 205 and 206 of the Federal Power Act, which were passed as part of Title II, expressly require the Commission to weigh discriminatory effects in rate proceedings. Section 205(b), 16 U.S.C. § 824d (b) (1970), prohibits any public utility "with respect to any transmission or sale subject to the jurisdiction of the Commission," from maintaining "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of services." [15] Section 206(a), 16 U.S.C. § 824e(a) (1970), requires the FPC to determine the just and reasonable rate whenever it, after a hearing, finds that the rate demanded "by any public utility for any transmission or sale subject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory or preferential." [16]

The question presented here is whether the FPC's authority, and responsibility, under §§ 205 and 206, extend to claims of discrimination between rates for two classes of service, only one of which is "subject to the jurisdiction of the Commission."

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[15] Section 205(b) states in full:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

[16] Section 206(a) provides, in full:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

The FPC and AP&L contend that the Commission cannot grant the relief requested by petitioners because it only has jurisdiction over the wholesale sale. In support of their argument, they point to the Congressional hearings on the Federal Power Act,[17] which suggest that the phrase "subject to the jurisdiction of the Commission" was added to § 205(b) in response to a request by the National Association of Railroad and Utilities Commissioners, which sought to avoid giving the FPC the "power over intrastate rates" that the Supreme Court, in Houston, East and West Texas Rwy. Co. v. United States (Shreveport Case), 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed.1341 (1914), found had been granted to the Interstate Commerce Commission. During the floor debates Representative Cole of Maryland explained the action of the House Committee in safeguarding the jurisdiction of the states: "[W]e have tried—and I think successfully—to avoid the injection into the Federal control, which this title confers, the extension thereof into intrastate activities in the way that the Shreveport case might permit." [18]

The "power over intrastate rates" and "the extension [of Federal control] into intrastate activities" that the *Shreveport* case permitted to the ICC goes far beyond the relief sought by petitioners, for the

[17] Hearings on H.R. 5423 and S. 1725 Before the Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess., pt. 3, at 1624 (1935). *See also id.*, pt. 1, at 503; H.R.Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935).

[18] 79 Cong.Rec. 10384 (1935).

Supreme Court in *Shreveport* upheld the power of the ICC to combat discrimination under § 3 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, 380, by issuing an order directed toward *intrastate* rates—in that case an order that would permit carriers to increase their intrastate rates above the level approved by the state commision.[19] Petitioners do not ask the FPC to modify or to authorize the modification of retail rates. They have only asked that the *interstate* rate increase proposed by AP&L be rejected [20] or reduced [21] if the anticompetitive allegations are found to have merit. The legislative history is not adverse to FPC jurisdiction in the case at bar, particularly when it is taken in the context of the broadly procompetitive purposes of Title II.

Turning to text, a common sense reading of the statutory language reveals no requirement that both rates involved in a pattern of discrimination fall within the jurisdiction of the Commission. If Congress had intended so to limit the reach of the statute it could have prohibited the maintenance of unreasonable differences in rates "between classes of service subject to the jurisdiction of the Commission." A

[19] The development of federal regulation of intrastate rates after *Shreveport* is discussed by Justice Frankfurter in his dissent in Public Service Commission v. United States, 356 U.S. 421, 429, 430-34, 78 S.Ct. 796, 2 L.Ed.2d 886 (1958).

[20] Petitioners' Protest, Motion to Reject, and Petition to Intervene, June 28, 1973, J.A. 29.

[21] Petitioners' Amended Petition to Intervene, August 22, 1973, J.A. 93.

fair interpretation of the statute as it is drafted is, instead, that any sanction imposed by the FPC to remedy an anticompetitive practice is to be addressed to the jurisdictional rate, and that any discrimination in rates that does not involve jurisdictional service, *i. e.*, discrimination between nonjurisdictional classes of service, is left completely to the state regulatory bodies.

The FPC's position would leave a regulatory gap —no institution would have authority to consider an undue preference between wholesale and retail rates, even where that preference was deliberately instituted for the purpose of clogging competition, and to reduce interstate wholesale rates. A legislative intention to achieve such a regulatory gap is not to be presumed unless expressly presented. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 85 S.Ct. 1517, 14 L.Ed.2d 466 (1965); Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682-83, 74 S.Ct. 794, 98 L.Ed. 1035 (1954).

On the issue before us, we see a statute that confers plenary jurisdiction to review the interstate wholesale rate and to provide relief addressed to such wholesale rate in order to further the public interest. The Commission has latitude to address the matter in consultation with, and after joint hearings with, the state commission. But it cannot wash its hands of the public interest problem as one totally beyond its jurisdiction.

B. *Ability of FPC to Consider and Investigate Nonjurisdictional Matters*

This interpretation of §§ 205 and 206 may on occasion require the FPC to consider AP&L's retail rate structures. FPC contends this "would result in this Commission interjecting itself in to an area in which it has no jurisdiction." [22] However, the FPC concedes that it is authorized to consider nonjurisdictional matters when necessary to the exercise of its jurisdictional authority. As it acknowledges in its brief, "[l]ike Section 5(a) of the Natural Gas Act, Section 206(a) of the Federal Power Act authorizes the Commission to consider retail costs. And, . . . Section 206 (b) specifically authorizes the Commission to undertake an investigation into certain nonjurisdictional sales." [23]

Interpreting § 5(a), the Supreme Court has held that "[t]he Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction." Panhandle Eastern Pipe Line Co. v. FPC, 324 U.S. 635, 646, 65 S.Ct. 821, 827, 89 L.Ed. 1241 (1945). In *Panhandle Eastern*, the Court reviewed a rate proceeding in which the Commision had examined a utility's retail business in order to allocate earnings between the regulated and unregulated

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[22] Order of October 29, 1973, Denying Amended Petition to Intervene and Clarifying Prior Order, J.A. 102.

[23] FPC Br. at 31.

business. That case is distinguishable, to be sure, but the underlying principle is one that permits the FPC to consider matters which would be completely nonjurisdictional taken by themselves, but are appropriate for consideration when germane to the meaningful execution of a jurisdictional function.

There are further indications that the Federal Power Act does not contemplate that the FPC is to operate in an airtight chamber, insulated from nonjurisdictional factors. In presenting Title II, the House Committee expressly said: "The new parts . . . contain throughout direction to the Federal Power Commission to receive and consider the views of State commissions." [24] Numerous statutory provisions implement this vision, authorizing the Commission to consider nonjurisdictional factors and to cooperate with state regulatory authorities. Section 209(b), 16 U.S.C. § 824h(b) (1970), permits the Commission to confer with any state commission "regarding the relationship between rate structures, costs, accounts, charges, practices, and regulations of public utilities subject to the jurisdiction of such State Commission and of the Commission," and to hold joint hearings with the state authorities. Section 311, 16 U.S.C. § 825j (1970), authorizes and directs the FPC "to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy . . . whether or not otherwise subject to the jurisdiction of the Commission, including

[24] H.R.Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935).

the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality . . . of any State or municipality or other political subdivision of a State." *See also* § 202(a), 16 U.S.C. § 824a(a) (1970), which requires the FPC to give notice to state commissions and "afford each such State commission reasonable opportunity to present its views and recommendations, and . . . receive and consider such views recommendations" before it establishes any regional district for the coordination and interconnection of electric facilities; and § 302(b), 16 U.S.C. § 825a(b) (1970), which has a similar provision with regard to the fixing by the FPC of rates of depreciation for licensees and public utilities.

In other contexts, the Commission has embraced its responsibility to consider intrastate rate relationships that touch on rate proceedings within its jurisdiction. For example, in Southwestern Public Service Co., 33 FPC 343 (1965), the Commission compared the conditions under which a utility's various wholesale customers rendered retail service in order to evaluate whether differences proposed in wholesale rates—different rates to investor-owned wholesale customers and to cooperative wholesale customers—"would seriously prejudice the competitive business relationships" between customers in the two groups. 33 FPC at 350.

C. *Authority of the FPC to Grant the Remedy Requested*

The Commission has the authority under § 206 to take unduly discriminatory effects into account in determining a just and reasonable wholesale rate, Gulf States Utilities Co. v. FPC, *supra*. This is the relief that petitioners seek. They do not ask the FPC to increase or decrease nonjurisdictional retail rates, but only to consider the evidence presented by the wholesale customers and, if anticompetitive effects are found to exist, to modify the concededly jurisdictional rates proposed by AP&L to the extent appropriate.[25]

The FPC erroneously construes the petition to intervene as requesting the Commission to "subordinate [its] jurisdiction to that of the state commissions by basing wholesale rates on retail rates." [26] Petitioners do not ask that the Commission subordinate its discretion to the state commissions or even that it tie the wholesale rate to the retail rate. Rather, they ask the Commission to consider their allegations of anticompetitive conduct, if established, as a factor in deciding whether the proposed rate is just and reasonable, as it does when allegations of anticompetitive effects between two jurisdictional rates

[25] Petitioners' Amended Petition to Intervene, August 22, 1973, J.A. 93; Petitioners' Petition for Rehearing, November 5, 1973, J.A. 116.

[26] Order of December 5, 1973, Denying Petition for Rehearing, J.A. 119.

are raised. Northern Natural Gas Co. v. FPC, 130 U.S.App.D.C. 220, 225, 399 F.2d 953, 958 (1968). The retail rates charged by AP&L in a market in which it is competing with its own customers are part of the factual context in which the proposed wholesale rate will function; they do not set an authoritative standard for what is a just and reasonable wholesale rate.

The Commission further contends that it cannot grant petitioners' requested relief because "[w]holesale rates must recover allocated wholesale costs" [27] and petitioners suggest "that the Commission reduce the proposed wholesale rates without regard to costs." [28] Because the Commission has raised a jurisdictional bar and refused to investigate petitioners' allegations, we cannot, at this stage, determine whether a wholesale rate low enough to abolish any discriminatory effects would fail to recover allocated wholesale cost. By arguing that any consideration of noncost factors to reduce a proposed rate necessarily produces a rate that fails to recover allocated costs, the Commission seems to assume that there is a single cost-recovering rate. Rather, there is a zone of reasonableness:

> Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is

[27] Order of October 29, 1973, Denying Amended Petition to Intervene and Clarifying Prior Order, J.A. 102.

[28] FPC Br. at 32.

> unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied "reasonableness" but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller.[29]

When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves.[30] There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain

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[29] Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251, 71 S.Ct. 692, 95 L.Ed. 912 (1951) (Jackson, J.).

[30] The FPC has acknowledged its ability to deal with this situation:

> It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate *per se*, if considered independently, might fall within the zone of reasonableness. There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned. The relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed.

Otter Tail Power Co., 2 FPC 134, 149 (1940).

retail revenues in order to curb the retail competition of its wholesale customers.

The case is remanded for further proceedings not inconsistent with this opinion. To avoid any possibility of misunderstanding, we expressly note that we do not intend any indication whether petitioners are entitled to relief on the merits, and we specifically note that on the remand the Commission will have full latitude to consider the significance of AP&L's rate changes subsequent to the Commission's order (of October 29, 1973) rejecting Petitioners' proposed submissions.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 73-2207

[Filed Apr. 4, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

CONWAY CORPORATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

ARKANSAS POWER & LIGHT COMPANY, INTERVENOR

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Before: TAMM, LEVENTHAL and MACKINNON, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that this case is hereby remanded to the Federal Power

Commission, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: April 4, 1975

Opinion for the Court filed by Circuit Judge Leventhal

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Docket Nos. E-8250
E-8071
E-8142

ARKANSAS POWER AND LIGHT COMPANY

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF SHEETS, DENYING MOTION TO REJECT, CONSOLIDATING PROCEEDINGS, ESTABLISHING HEARING PROCEDURES, INITIATING PROCEEDING UNDER SECTION 206 OF THE FEDERAL POWER ACT, AND PERMITTING INTERVENTION

(Issued July 31, 1973)

On June 1, 1973, Arkansas Power and Light Company (APLC) tendered for filing proposed changes in its Rate Schedule U3—Resale Service to Municipally Owned and Privately Owned Electrical Distribution Systems [1] and its proposed changes would in-

[1] Benton Municipal Light and Water Works, Water and Light Commission of Hope, City of North Little Rock Arkansas, City of Osceola, Arkansas, City of Prescott, Arkansas, City of West Memphis, Arkansas, Citizens Light & Power.

crease APLC's revenues from sales and service by $1,969,462 for the twelve month period ending July 31, 1972. The proposed effective date is August 1, 1973. (FPC Rate Designations are shown in Appendix A)

APLC states that no facilities will be installed or modified except to accommodate additional capacity and/or to provide points of delivery for customers' load growth in the future. Furthermore, APLC states that the Company does not propose to apply the 1.3% monthly additional facilities charge provided for in the new rate schedules to any presently installed transmission and distribution facilities. Finally, APLC states that the rate of return from service to the municipally owned and privately owned systems is 3.74% and from service to rural electric cooperatives the rate of return is a negative .15%.

The Company states that the proposed rates will enable the Company to improve its rate of return, which it believes is vital to attract the necessary amount of capital in order to provide adequate service to its present and future customers.

Notice of filing was issued on June 15, 1973, with protests and petitions to intervene due on or before June 28, 1973. A Protest, Motion to Reject, and Petitions to Intervene of Publicly Owned Whole-

[2] Conway Corporation, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative Inc., North Arkansas Electric Cooperative.

sale Customers [1] (Customers) was timely filed June 28, 1973. In support of its motion to reject, Customers first allege that the APLC's participates in anti-competitive activity and that the proposed rate increase would "squeeze" Customers out of competition with respect to sales to industrial customers.

By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anti-competitive issues. These standards are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anti-competitive activities. This action is without prejudice to Customers' right to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct.

Customers also allege several other grounds in support of its motion to reject. Firstly, Customers

[1] Conway Corporation, Benton Municipal Light & Water Works, Hope Water & Light Commission, City of North Little Rock, Arkansas, City of Osceola, Arkansas, City of Prescott, Arkansas, City of West Memphis, Arkansas, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative, Inc.

argue that by filing a split test year ending July 31, 1973, APLC has effectively understated its revenues. Secondly, Customers argue that certain factors utilized by APLC in construction of its cost of service are questionable; e.g., the utilization of a single peak allocation for its basis demand allocation. Thirdly, Customers argue that allowance of the nuclear adjustment clause would put the nuclear plant in its rate base while continuing to book interest during construction, since it does not anticipate putting the nuclear plant into operation prior to Spring, 1974. Fourthly, the Customers argue that the introduction of an embedded debt cost adjustment provision and a tax adjustment clause should be rejected as not meeting the justification for escalation factors set for in Commission's Opinion 633, *New England Power Company* (Docket No. E-7541) and if not rejected, should not be allowed to operate automatically. Fifthly, the Customers state that allowance of APLC's "additional facilities charge" would allow APLC to recover twice for all future line extension-recovery once by the "additional facilities charge" and secondly, recovery would be had in the increase cost of service.

In the event that the filing is not rejected, Customers urge the Commission to suspend the proposed rate schedule changes for the full five month statutory period provided for in Section 205(e) of the Federal Power Act, set the matter for hearing and request permission to intervene in these proceedings. Customers' motion to reject raises substantive issues

which cannot be summarily decided and require an evidentiary hearing which we have set forth herein.

On review of APLC's June 1, 1973, filing at Docket No. E-8250 and Customers' motion to reject or in the alternative suspend the filing indicates that the proposed rates have not been shown to be just and reasonable and may be unjust, unreasonable, preferential or unduly discriminatory or otherwise unlawful and may require a full evidentiary hearing.

On March 8, 1973, APLC tendered for filing in Docket No. E-8071, an initial Power Service Agreement between the City Water and Light Plant of the City of Jonesboro, Arkansas (Jonesboro) and APLC to become effective June 1, 1973.

APLC described the Agreement as lasting for a term of at least seven years, beginning on or about June 1, 1973, and providing for an initial block of at least 5,000 KW during the term of the Agreement. Jonesboro is not now served by APLC and there is no interconnection between their respective systems. APLC states that the city electrical system has need of additional firm capacity and energy to supplement its own generation and other sources of firm power supply in order to adequately supply the city's customers. APLC further states that the rates and charges provided for in the Agreement were arrived at through negotiations with Jonesboro, and they are designed to produce a return approximately equal to the Company's overall rate of return.

The Agreement provides that the demand charge shall be increased by one cent ($.01) per KW of

Contract Demand for each full one tenth of one percent (0.1%) increase in the Company's embedded cost of long-term debt above the 5.87% existing as of July 31, 1972. Furthermore, the energy charge will be increased or decreased to reflect the nearest one-thousandth (.001) mill per kilowatt-hour, the change in the cost of fuel utilized in Company-owned generating stations.

APLC's filing in Docket No. E-8071 was noticed on March 22, 1973 with motions of protest or intervention due on or before April 12, 1973. No motions to protest or intervene were received.

APLC's March 8, 1973, filing at Docket No. E-8071 became effective June 1, 1973. Our review indicates that the rates have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful. Therefore, we shall institute an investigation under Section 206 of the Federal Power Act to determine the justness and reasonableness of those rates.

We note that in a related case in Docket No. E-8142, the Commission in an order issued July 3, 1973, instituted an investigation under Section 206 of the Federal Power Act with respect to an embedded debt cost adjustment provision contained in the Power Coordination, Interchange and Transmission Agreement dated April 20, 1972 between APLC and Arkansas Electric Cooperative Corporation. Since the adjustment clause in Docket No. E-8142 is identical to the provision in Docket No. E-8250 and Docket No. E-8071, common issues of law and fact

are raised. We will accordingly order consolidation of these dockets. Consistent with this action, we will amend our order of July 3, 1973, in Docket No. E-8142 to provide dates for service of evidence and hearing consistent with our action herein.

The Commission finds:

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates and charges contained in APLC's Rate Schedules as proposed in Docket No. E-8250 filed May 31, 1973.

(2) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Federal Power Act that the Commission enter upon a hearing under Section 206 of the Federal Power Act to determine the justness and reasonableness of the Initial Power Service Agreement in Docket No. E-8071 filed March 8, 1973.

(3) The disposition of this proceeding, should be expedited in accordance with the procedures set below.

(4) In the event this proceeding is not concluded prior to the termination of the suspension period herein ordered in Docket No. E-8250 the placing of the rate and charges applied for in this proceeding into effect, subject to refund with interest, while pending Commission determination as to their justness and reasonableness, is consistent with the pur-

pose of the Economic Stabilization Act of 1970, as amended.

(5) Good cause exists for consolidation of Docket Nos. E-8250, E-8142, and E-8071.

(6) Constistent with our action consolidating Docket Nos. E-8250, E-8071 and E-8142, the procedural dates set forth in our July 3, 1973, order in the latter docket should be amended as hereinafter ordered.

(7) The petition to intervene of Customers should be granted as hereinafter ordered.

(8) The petition to reject in Docket No. E-8250 should be denied.

The Commission orders:

(A) The above enumerated rate schedules in Docket No. E-8250 filed May 31, 1973, are accepted for filing and their effectiveness is suspended until January 1, 1974.

(B) APLC is required in Docket No. E-8250 and in E-8071 to file within 60 days of the issuance of this order an updated cost of service for the twelve month test period ending June 30, 1973 (in accordance with Regulations 35.13 and 35.12 respectively).

(C) APLC's March 8, 1973 filing at Docket No. E-8071 constituting an initial Power Service Agreement with Jonesboro is hereby accepted for filing to become effective June 1, 1973 as requested.

(D) An investigation into the justness and reasonablenes of the initial Power Service Agreement with Jonesboro at Docket No. E-8071 is hereby instituted under Section 206 of the Federal Power Act.

(E) Docket Nos. E-8250, E-8142 and E-8071 are hereby consolidated and set for hearing in accordance with the schedule established in ordering paragraph (F) hereof.

(F) Pursuant to the authority of the Federal Power Act, including Sections 205, 206, 308, and 309 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a public hearing shall be held commencing with a pre-hearing conference on February 5, 1974, at 10:00 A.M., EDT in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D. C. 20424, concerning the lawfulness of the rate increase and adjustment clauses set forth above.

(G) On or before January 4, 1974, the Commission Staff shall serve its prepared testimony and exhibits. The prepared testimony and exhibits of any or all intervenors shall be served on or before January 15, 1974. Any rebuttal evidence by APLC shall be served on or before January 29, 1974. Cross-examination on the evidence filed will commence on February 12, 1974.

(H) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for the purpose (see Delegation of Authority, 13 C.F.R. 3.5(d)), shall preside at the hearing in this proceeding, and shall prescribe relevant procedural matters not herein provided, and shall control the proceeding in accordance with the policies expressed in the Commision's Rules of Practice and Procedure.

(I) The above-named petitioners are hereby permitted to intervene in this proceeding, subject to the rules and regulations of the Commission: *Provided, however*, that the participation of such intervenors shall be limited to matters affecting rights and interests specifically set forth in the respective petitions to intervene, except Customer's participation is limited to matters other than the alleged anti-competitive activities, and *Provided, further*, that the admission of such intervenors shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(J) Customer's motion to reject in Docket No. E-8250 is denied.

(K) Nothing contained in this order shall relieve the Applicant of any responsibility imposed by the Economic Stabilization Act of 1970, (Public Gas 91-370, 84 Stat. 799, as amended by Public Law 92-15, 85 Stat. 38), or by any Executive Order or rules and regulations promulgated pursuant to such Act.

(L) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission:

(SEAL)

Mary B. Kidd,
Acting Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

WHOLESALE ELECTRIC RATES—Denial of Rehearing

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Docket Nos. E-8250
E-8071
E-8142

ARKANSAS POWER AND LIGHT COMPANY

ORDER DENYING AMENDED PETITION TO INTERVENE AND CLARIFYING PRIOR ORDER

(Issued October 29, 1973)

On July 31, 1973, we issued an order in this proceeding which granted a certain petition to intervene [1] filed June 28, 1973, with the condition that the participation of the intervenors would be limited to matters other than the anticompetitive activities alleged.

[1] Parties included in the joint petition are as follows: Conway Corporation, Benton Municipal Light and Water Works, Hope Water and Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

Relying on our decision in *Indiana and Michigan Electric Company* (I&M) order, Docket No. E-7740 issued on May 31, 1973, we found that said petition failed to specify the relief which was within the Commission's authority to grant. We permitted petitioner, however, the right to file an amended petition which would set forth the relief for the alleged anti-competitive conduct that is within this Commission's authority to grant.

On August 22, 1973, petitioners filed an amended petition reciting arguments and statements similar to those made in its initial petition to intervene. Specifically, petitioners allege that APLC's proposed rates is unduly discriminatory vis-a-vis the Company's retail industrial rates. The specific relief petitioners seek in the context of the proceeding is "that the Commission reduce the rate sought by APLC to eliminate the price squeeze . . ."

The relief sought by Petitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable. APLC has submitted its full evidentiary presentation including a cost of service as well as testimony and exhibits of their witnesses which they state support the subject wholesale rate increase. That evidence, including APLC's allocation of its costs to its wholesale service, is, of course, subject to review and cross-examination by all parties including the intervenors and is also of course subject to re-

view and decision thereon by the Presiding Trial Judge assigned to the case as well as the Commission itself.

Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates. However, APLC's industrial rate level and the accounting and rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commision. We have no jurisdiction over APLC's industrial rates, and we do not choose to open this hearing to an examination of those rates. Such an action would require a detailed analysis of APLC's retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.

Petitioners' allegation of "price squeeze" in and of itself, does not constitute anticompetitive behavior by APLC given the fact that any wholesale rates we approve must be based on allocated wholesale costs. To approve rates which recover less than those costs would produce grave consequences, since such action would be tantamount to imposing confiscatory rates on APLC and possible subsidization of APLC's wholesale service by APLC's industrial customers or other retail customers of APLC over whom we have no jurisdiction. Moreover, Petitioners' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the state commission.

Customers' amended petition cites language in *Gulf States Utilities Co.* v. *F.P.C.*, et al.,[2] which it asserts directs the Commission to eliminate rate structures which are anticompetitive by reason of a price squeeze. However, as we stated in our order in *Southern California Edison Company*, Docket No. E-8176, issued on September 21, 1973, the *Gulf States* opinion clearly states that its ruling is not to be interpreted as saying that the Commission must always hold a hearing on the antitrust issue.[3] The Supreme Court also noted without objection, that the Court of appeals had observed that the summary disposition of the anti-trust argument in a proceeding might be acceptable provided such disposition does not go unexplained.[4]

Finally, petitioners state that they interpret the Commission's order of July 31, 1973, to mean that the Commission "accepts (1) the specification of 'facts relied upon' in the original Petition, and (2) the specification of the 'anti-competitive practices challenged' relied upon in the original Petition . . ." The facts relied upon by petitioners do not, in and of themselves, prove the validity of the matters asserted and if a full evidentiary hearing had been required on this issue, the facts relied upon would require further development.

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[2] *Gulf States Utilities Co.* v. *F.P.C., et al,* 411 U.S. 747 at p. 758 (1973).

[3] *Ibid* at p. 762.

[4] *Ibid* at p. 762.

The Commission finds:

(1) Based on our review of the filing by APLC, and the pleadings of the parties herein, we find that no anticompetitive issue has been presented which would require further development in this proceeding.

(2) We find the relief sought by the petitioners to be beyond the scope of this Commission's jurisdiction, contrary to the purposes of the Federal Power Act and inappropriate in this proceeding, the purpose of which is to review the justness and reasonableness of APLC's proposed wholesale rates.

The Commission orders:

The amended petition, filed by Customers, is hereby denied.

By the Commission.

[SEAL]

KENNETH F. PLUMB
Secretary

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

WHOLESALE ELECTRIC RATES—Denial of Rehearing

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Arkansas Power and Light Company)

Docket Nos. E-8250
E-8142

ORDER DENYING PETITION FOR REHEARING

(Issued December 5, 1973)

On November 5, 1973, a customer group [1] (Customers) of Arkansas Power and Light Company (APLC) filed a Petition For Rehearing of our order issued in this docket on October 29, 1973. In the October 29 order, we denied, *inter alia*, Customers' Amended Petition For Intervention and ruled that the antitrust allegations made by Customers therein would not be considered in the hearing ordered. Spe-

[1] Parties included in the petition are: Conway Corporation, Benton Municipal Light and Water Works, Hope Water and Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers' Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

cifically, we found that no anticompetitive issue had been presented which required further development in an evidentiary hearing since the relief requested by the Customers was ". . . beyond the scope of this Commission's jurisdiction, contrary to the purposes of the Federal Power Act and inappropriate in this proceeding, the purpose of which is to review the justness and reasonableness of APLC's proposed wholesale rates." [2]

Customers are in error in their allegation that our order is inconsistent with the Commission's position in the *Gulf States* case.[3] As indicated by Customers, we stated in *Gulf States* that a remedy might be provided for anticompetitive conduct in a rate case. However, the particular remedy sought by Customers in this proceeding is beyond the authority granted us by Section 205 and 206 of the Federal Power Act.

Customers refer us to the *Panhandle Eastern* case [4] which Customers maintain supports the proposition that the language of 205(b) of the Federal Power Act grants this Commission authority "to lower the wholesale rate subject to its jurisdiction in order to eliminate the unreasonable difference between classes of service here alleged." Customers also state that *Panhandle Eastern* is not susceptible to the inter-

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[2] *Arkansas Power and Light Company*, Docket Nos. E-8250, E-8071 and E-8142, Order issued October 29, 1973, page 4.

[3] *Gulf States Utilities Co.*, v. *FPC*, 411 U.S. 747 (1973).

[4] *Panhandle Eastern Pipeline Co.*, v. *FPC*, 324 U.S. 635, 646-647 (1945).

pretation placed upon that case by the Commission in an order issued November 2, 1973 in *Southern California Edison Co.*, Docket No. E-8176, at page 2.

We disagree with Customers' reading of the *Panhandle* case and reaffirm our interpretation as stated in our order issued November 2, 1973 in *Southern California.* As we stated in that order, "In *Panhandle Eastern*, the issue was the propriety of the Commission's determination of the proper allocation of costs to *Panhandle Eastern's* wholesale service." In ascertaining the costs associated with the wholesale service, this Commission was called upon to consider "what costs are fairly attributable to each business, wholesale and retail, and what the resultant rate for wholesale business should be." [5] As we indicated in our October 29, 1973 order in this docket, we fully intend to design wholesale rates which recover properly allocable wholesale costs. In the process of designing proper wholesale rates, we certainly will consider the cost responsibility of APLC's direct industrial service in determining cost properly allocable to APLC's wholesale service. This process of designing proper wholesale rates is, however, an entirely different matter from Customers' position that we must subordinate our jurisdiction to that of the state commissions by basing wholesale rates on retail rates.

We note that this Commission has not been reluctant to consider antitrust issues in rate cases in

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[5] *Ibid.*, at 647.

those instances where we have the statutory authority to provide relief. For instance, in *Carolina Power and Light Company*,[6] this Commission on its own motion instituted a proceeding under Section 206 of the Federal Power Act to investigate an Availability Clause in a wholesale rate tariff for sales to municipal customers with regard to the possible anticompetitive nature of such clauses.

Finally, we note that Customers' petition for rehearing seems to interpret our order of October 29, 1973 as barring all anticompetitive issues from consideration in this proceeding. While the Commission has denied the particular antitrust issues raised by Customers in this proceeding, this is not to say that antitrust issues which are the proper subject of this Commission's jurisdiction could not be considered if properly raised.

The Commission finds:

The Petition for Rehearing of Customers, filed November 5, 1973, raises no new facts or issues of law requiring a modification of our order issued in this docket on October 29, 1973.

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[6] Docket No. E-7918, order issued on March 12, 1973.

The Commission orders:

The Petition for Rehearing, filed by Customers on November 5, 1973, is hereby denied.

By the Commission.

[SEAL]

Kenneth F. Plumb,
Secretary.

APPENDIX F

DECLARATION OF POLICY; APPLICATION OF PART; DEFINITIONS

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [49 Stat. 847; 16 U.S.C. 824(a)]

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the

transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. [49 Stat. 847-848; 16 U.S.C. 824(b)]

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. [49 Stat. 848; 16 U.S.C. 824(c)]

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale. [49 Stat. 848; 16 U.S.C. 824(d)]

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. [49 Stat. 848; 16 U.S.C. 824(e)]

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [49 Stat. 848; 16 U.S.C. 824(d)]

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [49 Stat. 851; 16 U.S.C. 824d(a)]

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. [49 Stat. 851; 16 U.S.C. 824d(b)]

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect

or relate to such rates, charges, classifications, and services. [49 Stat. 851; 16 U.S.C. 824d(c)]

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [49 Stat. 851-852; 16 U.S.C. 824d(d)]

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer

the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 852; 16 U.S.C. 824d(e)]

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rate, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [49 Stat. 852; 16 U.S.C. 824e (a)]

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852; 16 U.S.C. 824e(b)]

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